

MEMORANDUM OF LAW

DATE: January 9, 1990

TO: Ed Ryan, City Auditor and Comptroller
FROM: C. M. Fitzpatrick, Assistant City Attorney
SUBJECT: San Diego City Charter Sections 80 and 99;
Applicability As They May Relate to
Contemplated Major Construction Projects.

BACKGROUND

At recent meetings we have discussed the proposed financing and construction of a new civic center which may be undertaken by the City in the near future. This project is estimated to cost in excess of \$200,000,000 and you have rightly expressed a concern that this proposed project be financed and contracts for its construction be awarded in a fashion which clearly meets the standards of the State Constitution, our Charter and applicable state statutes and local ordinances. Of particular concern to you at this time is the need for assurance that the debt limitation provisions imposed upon this City by the State Constitution and City Charter Sections 80 and 99 are fully met and complied with at all times. This memorandum is being written in order to provide you with those assurances.

THE CIVIC CENTER PROJECT

As you know, it is proposed that this project be financed with lease-revenue certificates of participation ("COPs") utilizing San Diego Facilities and Equipment Leasing Corporation as the owner-lessor-issuer of the certificates. This memorandum does not address in any detail the validity of this proposed transaction other than to comment that we have no reason to believe that there are any fundamental legal issues which need to be addressed at this time. The proposal, as presently conceptualized and in progress, uses legally accepted methods of financing relying on the lease exception to the constitutional and charter debt limitations of which you are aware.

However, it is in the proposed structuring of the COP issues themselves that your concern arises. Presently, it is contemplated that the first COPs will be issued and sold in the principal amount of approximately \$30,000,000 on or about February 21, 1990. This will provide sufficient funds for land acquisition, more detailed engineering studies and the structuring of the design-build competition. The next phase of financing is not contemplated until November 1990, but in the

interim the City Council may be called upon to consider and award the basic design-build contract for construction of a major portion of the facility for a sum substantially in excess of the remaining funds derived from the first COP issue referred to above.

So, you ask, pursuant to Section 80 of the Charter, how may you validly and legally certify to the City Council that the money required to pay for the basic design-build contract is in the treasury to the credit on the appropriation from which it is to be drawn and that it is otherwise unencumbered? Must you insist that there be a COP issued and sold which will provide for your certification or is there any alternative to that course of action?

It seems to us that the answer to that question lies in the language of Charter Sections 80 and 99, respectively (and the application of particular provisions of each), as follows:

Section 80 provides:

SECTION 80. MONEY REQUIRED TO BE IN TREASURY.

No contract, agreement, or other obligation, involving the expenditure of money out of appropriations made by the Council in any one fiscal year shall be entered into, nor shall any order for such expenditure be valid unless the Auditor and Comptroller shall first certify to the Council that the money required for such contract, agreement or obligation for such year is in the treasury to the credit of the appropriation from which it is to be drawn and that it is otherwise unencumbered. The certificate of the Auditor and Comptroller shall be filed and made a matter of record in his office and the sum so certified as being in the treasury shall not thereafter be considered unencumbered until the City is discharged from the contract, agreement or

obligation. All unencumbered moneys actually in the treasury to the credit of the appropriation from which a contract, agreement or obligation is to be paid and all moneys applicable to its payment which before the maturity thereof are anticipated to come into the treasury to the credit of such appropriation shall, for the purpose of such certificate, be deemed in the treasury to the

credit of the appropriation from which the contract, agreement or obligation is to be paid. (Emphasis supplied.)

Section 99 provides:

SECTION 99. CONTINUING CONTRACTS.

The City shall not incur any indebtedness or liability in any manner or for any purpose exceeding in any year the income and revenue provided for such year unless the qualified electors of the City, voting at an election to be held for that purpose, have indicated their assent as then required by the Constitution of the State of California, nor unless before or at the time of incurring such indebtedness provision shall be made for the collection of an annual tax sufficient to pay the interest on such indebtedness as it falls due, and also provision to constitute a sinking fund for the payment of the principal thereof, on or before maturity, which shall not exceed forty years from the time of contracting the same; provided, however, anything to the contrary herein notwithstanding, when two or more propositions for incurring any indebtedness or liability are submitted at the same election, the votes cast for and against each proposition shall be counted separately, and when the qualified electors of the City, voting at an election for that purpose have indicated their assent as then required by the Constitution of the State of California, such proposition shall be deemed adopted. No contract, agreement or obligation extending for a period of more than five years may be authorized except by ordinance adopted by a two-thirds' majority vote of the members

elected to the Council after holding a public hearing which has been duly noticed in the official City newspaper at least ten days in advance.

Of particular note in the controlling portion of Section 80 is the phrase ". . . all moneys applicable to its (the contract's) payment which before the maturity thereof are anticipated to come into the treasury . . . shall . . . be deemed

in the treasury to the credit of the appropriation. . ."
(Underlined for emphasis above.)

The significant portion of Section 99 says ". . . No contract . . . extending for a period of more than five years may be authorized except by ordinance adopted by a two-thirds' majority vote of the . . . Council . . ."

Reading these two provisions in para materia, and giving equal weight to each, we believe that if the City Council, by a two-thirds' majority, adopts the master lease supporting the original COP issuance (which will clearly indicate the need to issue additional certificates) in compliance with the above-referenced portions of Charter Section 99, then you will be able to certify by your auditor's certificate that it is indeed "anticipated" that there will be moneys in the treasury to pay for construction under the design-build contract when those moneys become due thereunder relying on the City Council's expressed intent to do so as expressed in an approved master lease and financing schedule.

This will, of course, require that a detailed schedule of COP issuances phased to meet monetary needs under the design-build contract (as well as all other anticipated monetary needs) has been duly adopted by the Council in February 1990 as a part of this overall plan. Thus, we believe you may then issue your certification accordingly.

JOHN W. WITT, City Attorney

By

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